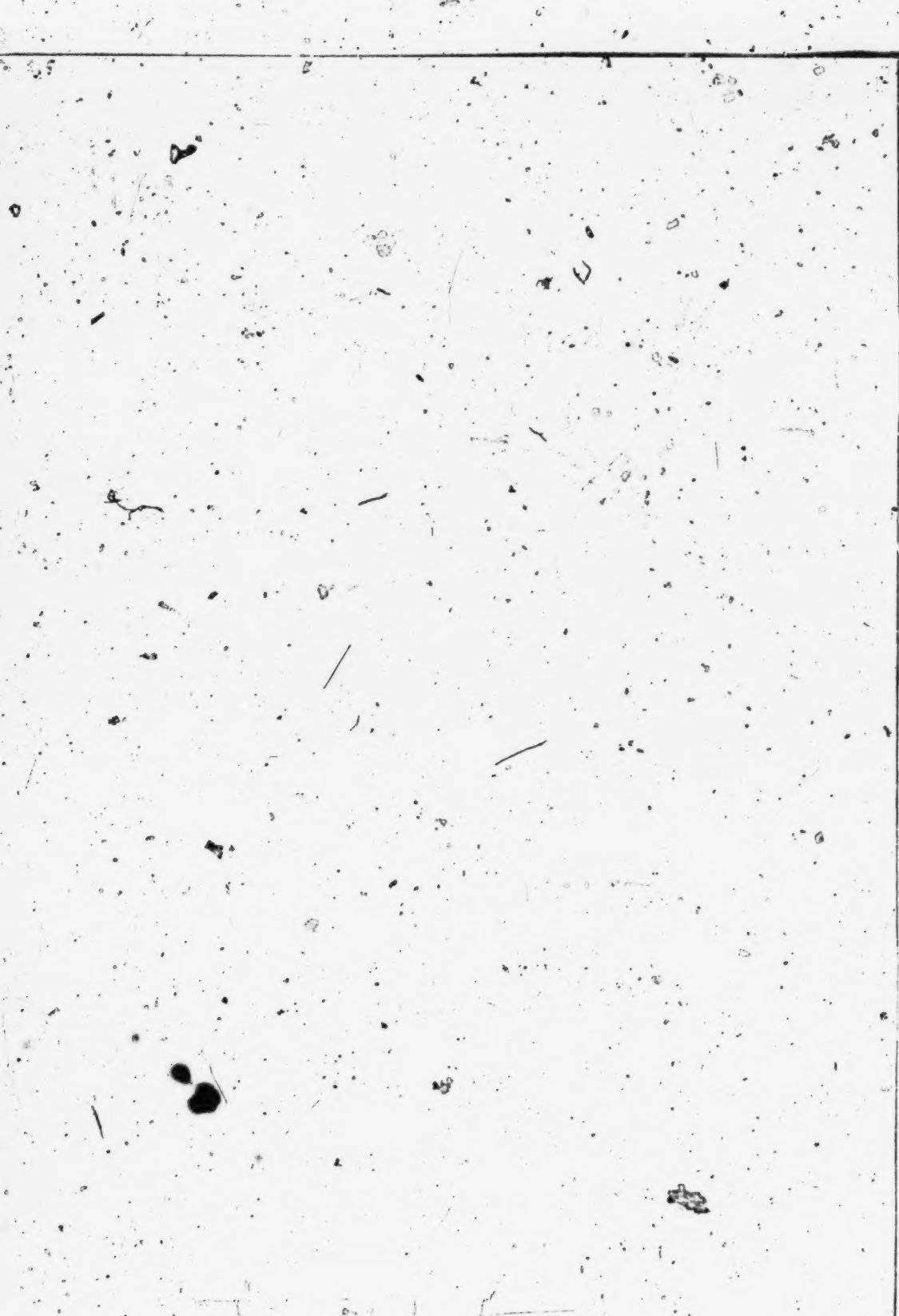

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IN THE

Supreme Court of the United States

October Term, 1964

No. 935

FRANK M. JORDAN, as Secretary of State of the State of California, EDMUND G. BROWN, as Governor of the State of California, THOMAS C. LYNCH, as Attorney General of the State of California, and THE SENATE OF THE LEGISLATURE OF THE STATE OF CALIFORNIA,

Appellants,

vs.

PHILL SILVER,

Appellee.

MOTION TO DISMISS OR AFFIRM.

Apellee in the above-entitled case moves to dismiss or affirm on the grounds that it is manifest that the question presented is so unsubstantial as not to require further argument.

/s/ Phill Silver
Appellee In Prose

Opinion Below: The opinion of the Court below is not reported. It is printed in Appendix A, in the statement as to jurisdiction and an earlier opinion in the same case. (Appendix B)

Jurisdiction: The jurisdictional requisites are set forth in the jurisdictional statement. (J.S. pages 1, 2

and 3.) The cases relied upon to establish the substantiality of the questions presented by this Appeal is either not pertinent or are distinguishable and support the Appellee.

Question Presented.

1. Did the District Court correctly determine that equal protection of the law was denied a citizen and elector of the most heavily populated county of the State of California by that state's constitutional and statutory provisions for a legislature of two houses, one of which was, and the other of which was not, required to be apportioned in accordance with population; and, on that account, ordering the legislature of the state, within the time fixed in the order, to reapportion the latter house on a population basis, in default of which the court would itself effect such a reapportionment.

Constitutional Provisions Involved.

The provisions of the constitution of the United States and of the constitution of California involved in this appeal are set forth in Appendix C of the jurisdictional statement.

Statement of the Case.

This is a class action brought by a citizen of the United States and of California and as an elector and registered voter of Los Angeles County, on his own behalf and on behalf of all other citizens, electors and registered voters of the State of California similarly situated.

The challenge was made that the provisions of Article IV, Section 6, of the California Constitution as colorably

amended in 1926, violate the Fourteenth Amendment of the Constitution of the United States in that the apportionment formula contained therein has resulted when applied to the population figures of the State of California, in a grossly unfair representation in the California Senate in favor of the lesser populated rural areas of the state, to the great disadvantage of the citizens residing in the densely populated urban centers of the state.

It was alleged that plaintiff's vote and right of representation in the California Senate is but 1/450th of those voting in the 28th Senatorial District. It was further alleged that as a result of the Constitutional Provisions challenged, to wit: Article IV, Section 6, California Constitution, the votes of the plaintiff and of all of the persons for whose benefit this action has been brought, are not as effective in the California Senate as the votes of other citizens residing in rural areas of the State. That the plaintiff and all other citizens similarly situated are suffering a debasement of their vote by virtue of the arbitrary, obsolete, and unconstitutional apportionment of the Senate and they, and all other similarly situated citizens are denied the equal protection of the law required by the Fourteenth Amendment of the United States Constitution.

The court below, following the receipt of documentary evidence and stipulated sets of facts, held that the present plan of Senate Apportionment in California is unconstitutional being an invidious discrimination of citizens rights and violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution as interpreted and determined by the Supreme Court of the United States.

The court granted the following relief:

That the California State Legislature properly reapportion itself as its first order of business in the 1965 Session, consistent with the opinion of the court and the existing United States Supreme Court decisions on the subject, so that the Reynold's Doctrine of "Districts of Substantial Equality in Population" exist.

That should the California State Legislature fail to discharge its duty fairly, adequately, and validly, redistrict State Senatorial Districts within the State of California, by not later than July 1, 1965, that the court will before or after that date, hold further hearings, or motions; devise re-districting plans; and make such further orders or take such further steps as may be necessary or appropriate, either upon its own motion, or on the motion of any party or intervenor, and to that end retain full jurisdiction of the matter.

California Apportionment When Suit Was Brought.

The provisions apportioning the state senate (Article IV, Section 6, of the California Constitution), as it existed at the time the suit was brought, divided California into forty Senatorial Districts. Each Senatorial district was to choose one senator. This apportionment was the result of the adoption of an initiative measure in 1926. The provisions provided further that no county was to have more than one representative in the Senate and no senator was to represent more than three counties. The court below took judicial knowledge of the population disparities which existed in the present apportionment of seats in the California State Senate. For example, according to the Federal Census of 1960, the population of the 38th Senatorial District

comprising Los Angeles County, was 6,390,771. The population of the 28th Senatorial District comprising Mono, Inyo and Alpine Counties was 14,294. This was a ratio of almost 450 to 1.

Other disparities exist with respect to other Senatorial Districts. The 40th Senatorial District, San Diego County, 100 to 1, as compared to District 28. The 16th Senatorial District, Alameda County, 90 to 1, as compared to District 28. The 14th Senatorial District, San Francisco County, 60 to 1, as compared to District 28; the 35th Senatorial District, Orange County, 50 to 1, as compared to District 28.

The court below rejected the defendants' contention that population is not the only basis for apportioning of seats in the State Senate and that a diffusion of political power between urban and rural areas should be permissible.

And the court below concluded that California's Senatorial Apportionment under Article IV, Section 6, as amended in 1926, is invidiously discriminately, being based on no constitutionally valid policy; that therefore, it was invalid under the equal protection clause of the Fourteenth Amendment, since it substantially diluted one's right to vote solely because of where one happens to reside.

The Opinion Below: The court below found that any reliance on the political remedies of initiative and referendum available had no constitutional relevance. That even though a majority of the electorate may have voted to retain the present apportionment scheme in California, under Article IV, Section 6, as amended in 1926, such a vote could not be sustained if it deprived others of the equal protection of the laws under the

Fourteenth Amendment. Additionally, the court concluded that any reliance on California's large area, diverse interest, history, section of differences, and the argument the districts would be too large in area, were immaterial. That the California State Senate is strictly apportioned on an area basis, without any consideration to the substantially equal population doctrine of *Reynolds v. Sims*, and its companion cases.

A Motion to Dismiss or Affirm May Be Made on the Ground That "It Is Manifest That the Questions on Which the Decision of the Cause Depends Are so Unsubstantial as Not to Need Further Argument".

Motions to dismiss or affirm are governed by Rule 16 of this Court. Section 1(c) provides that this court will receive such a motion on the ground that "It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Appellee moves that the per curiam order of the District Court be affirmed or the appeal be dismissed on the following ground:

(1) That the questions presented are so unsubstantial as not to warrant further argument.

Summary of Argument.

On March 26, 1962, the United States Supreme Court held that a justiciable Federal Constitutional Cause of Action is stated by a claim of arbitrary impairment of votes by means of invidiously discriminatory geographic classification. (*Baker v. Carr*, 369 U.S. 186).

Thus, the United States Supreme Court, in a decision of first impression of that court established a new Federal judicial precedent that questions of territorial discrimination and apportionment of state legislatures are questions which must be decided by the courts.

On April 23, 1962, the United States Supreme Court, in reversing a decision rendered by the Michigan Supreme Court, declared that the equal protection claim presented by the voters in that case was enforceable in the Courts of that State. (*Scholle v. Hare*, 8 Law. Ed. 2d 1, 369 U.S. 429).

In 1962, a class action was filed in a Los Angeles Federal Court on behalf of the citizens and qualified voters of the County of Los Angeles, making the claim that the Fourteenth Amendment to the United States Constitution requires both houses of the California Legislature to be apportioned on the basis of population. The complaint alleged that the method of apportionment set forth in the California Constitution (Art. IV, Sec. 6) was unconstitutional under the equal protection clause of the United States Constitution.

The complaint states that the method of representation that existed in the State of California when applied to the population figures of the state resulted in a grossly unfair weighting of both houses of the State

Legislature in favor of the less populated areas to the great disadvantage of the densely populated urban centers of the state.

It was further alleged that the Citizens of the heavy populated areas were being subjected to taxation without representation, and that the California apportionment formula was contrary to the prevailing philosophy of government in the United States and all Anglo-Saxon jurisdictions.

The relief sought in the complaint was a declaration by the Federal Court that the 1926 Amendment to the California State Senate consistent with the Court's opintive.

The three judge court in this case (2-1) ordered that the California State legislature reapportion the California State Senate consistent with the court's opinion and the existing Supreme Court decisions so that the Reynold's doctrine of "districts of substantial equality in population" exists.

In the following cases among others this court has held *inter alia* that both houses of a bicameral state legislature must be apportioned substantially on a population basis. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; *WMCA, Inc. v. Lomenzo*, 377 U. S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568; *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed. 2d 595; *Davis v. Mann*, 377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609; *Roman v. Sincock*, 377 U.S. 695, 84 S.Ct. 1449, 12 L. Ed.2d 620, and *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632.

Appellants seek to distinguish this case from the cases heretofore decided by this court on the following alleged grounds:

(1) The challenged apportionment was freely adopted by an electorate having a clear cut choice between it and one based on population. (Juris Statement p. 14)

(2) That this court has not passed upon a legislation apportionment that the people of a state, the majority of whom live and vote in the populous centers of the state, have repeatedly voted to adopt and retain. (Juris St. p. 15.)

(3) That a constitutional right to vote may be waived. (Juris St. p. 15.)

(4) Every case has to be considered on its own facts and in relation to the conditions existing in the state from which the case comes. (Juris St. p. 16.)

(5) The minority should be protected against the excesses of the majority. — Different interests exist in different classes of citizens.

(6) That California's unique factual situation and the particular history of the adoption of its system of legislative apportionment provide the basis of a classification resting on rational grounds. (Juris St. p. 17.)

(7) A bicameral legislature composed of a popular and a geographical house in order to diffuse political initiative is not an irrational plan. (Juris St. p. 17.)

(8) It is a substantial question whether the purpose to provide a (bicameral) check and balance is an invidious discrimination against those who have the power to control all else if the State's government and ultimately to write their wishes into law. . . . The decisions so far rendered by this court do not necessarily foreclose this question beyond the possibility of rational differentiation. (Juris St. p. 18.)

(9) Compliance with the order of the court below is virtually impossible in California without disregard by the State legislature of the provisions of the State Constitution that fix the size of the Senate at 40 members, and require that they be elected from districts in the formation of which no county may be divided nor any part of a county united with another. (Cal. Const. Art. IV, Sec. 6) That it is a question of considerable substantiality whether in apportioning on the basis prescribed by the court below the California legislature may disregard and if so to what extent, those provisions of the State Constitution. (Juris St. p. 19.)

(10) Similar provisions in the Constitution of Colorado have been held to preclude validity of a reapportionment statute violating them, notwithstanding determination by a United States District Court [*Lucas v. Forty-Fourth General Assembly D. Colo.*, 232 F. Supp. 797] that the statute was offensive to the Equal Protection Clause [*White v. Anderson* (Colo. 1964), 394 P. 2d 333, 335]. This court seemingly has approved that approach, as it vacated part of the judgment in

Lucas for further consideration in the light of White. [*Forty-Fourth General Assembly v. Lucas* (Feb. 1, 1965)] 379 U.S. .... (Juris St. p. 19.)

(11) Without guide lines from the courts, it is not unlikely that a Constitutional Amendment will be needed [*White v. Anderson,* 394 P. 2d 333]. (Juris St. pp. 20-21.)

(12) A legislature ordered to do that which cannot be accomplished without violating the organic law of its State, ought to be told what it may lawfully do, or given an opportunity to get the answer from the State Courts. (*Yorty v. Anderson,* 60 Cal. 2d 312, 317, 384 P. 2d 417, 420, 33 Cal. Rptr. 97-100 (Juris St. p. 21).)

(13) The question whether in default of legislative reapportionment a Federal Court will carry on the process by itself is one that has not been foreclosed or obviated by *Reynolds v. Sims,* 377 U.S. 533 and it is one "which should be determined only after the fullest plenary and most deliberate consideration in the part of this Court." (Juris St. pp. 21-22.)

The Decision of the Three Judge Court Was Clearly Correct.

The three-judge Federal Court relying upon *Reynolds v. Sims,* 377 U.S. 533, concluded:

"California's Senatorial Apportionment under Article IV, Section 6, as amended in 1926, is invidiously discriminatory, being based on no constitutionally valid policy; therefore, it is invalid under the equal protection clause of the 14th amend-

ment, since it substantially dilutes one's right to vote, solely because of where one happens to reside."

The three judge court rejected the argument made to it that a majority of the electorate had voted to retain the present apportionment scheme in California under Article IV, Section 6, as amended in 1926, stating, * * *

"It is clear that the mere fact that California voters have consistently rejected any reapportionment of the State Senate on a population basis by the initiative process in the elections of 1928, 1948, 1960, and 1962, is immaterial."

Exact numerical equality of population among legislative districts is not required by the equal protection clause of the 14th Amendment to the United States Constitution. However, it is clear in the *Baker v. Carr* case, 369 U. S. 187, 7 L. Ed. 2d 663 (1962), that a voter is deprived of his right to have equal protection of the laws if the number of voters in his legislative district is unreasonably and irrationally large.

Reply to Appellants' Argument That the Challenged Apportionment Was Freely Adopted by an Electorate Having a Clear Cut Choice Between It and One Based on Population.

In *Lucas v. Colorado General Assembly*, 377 U.S. 713, 730 the Colorado scheme of apportionment attacked before the Supreme Court was one adopted by a majority vote of the Colorado electorate almost contemporaneously with the District Court's decision on the merits.

The Supreme Court rejected the argument that the Colorado voters had made a definite choice between

two contrasting alternatives, or that they had indicated that "minority process in the Senate is what they want." (*Id.* p. 732.)

The Supreme Court further concluded, "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a states electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause".

The court added, "Manifestly the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act."

Reply to Appellants' Argument That Compliance With the Order of the Court Below Is Virtually Impossible Without Disregard by the State Legislature of the Provisions of the State Constitution.

Appellant argues that compliance with the order of the court below is virtually impossible because of the provisions of the State Constitution that fix the size of the Senate at 40 members, and require that they be elected from districts in the formation of which no county may be divided nor any part of a county united with another. (Calif. Const. Art. IV, Sec. 6.)

Appellant presents this issue as if it were a question of first impression.

The courts have repeatedly upheld the right to declare unconstitutional a State Constitutional provision which conflicts with the Federal Constitution:

American Federation of Labor v. Watson, 327 U.S. 582, 592, 66 S. Ct. 761, 90 L. Ed. 873;

Davis v. McCarty, 388 P. 2d 480 (S. Ct. Okla., Jan. 1964);

Butcher v. Bloom, 203 A. 2d 556 (S. Ct. Penn., Sept. 1964);

Lucas v. Colorado General Assembly, 377 U.S. 713;

W.M.C.A. v. Lomenzo, 377 U.S. 633;

Maryland v. Tawes, 377 U.S. 656;

Roman v. Sincock, 377 U.S. 695;

White v. Anderson, 394 P. 2d 333 (S. Ct., Colo., July, 1964);

Sweeney v. Notte, 183 A. 2d 296 (Rhode Island, 1962);

Scholle v. Hare, 116 N.W. 2d 350, 367 Mich. 176.

Since *Baker v. Carr,* the Supreme Law of the Land is that such gross inequity as exists under the present apportionment statute of the State of California is violative of the Fourteenth Amendment of the United States Constitution.

As Mr. Justice Douglas stated in *Gray v. Sanders,* 9 L. Ed. 2d 821, 83 S. Ct. 801 (1963):

> "As we stated in *Gomillion v. Lightfoot,* 364 U.S. P. 347, 'When a state exercises power wholly within the domain of state interests, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.'"

The answer to the question presented by the Appellant herein is found in *Scholle v. Hare,* 369 U.S. 429,

8 L. Ed. 2d 1, where this court remanded the case "for further consideration" in the light of *Baker v. Carr.*

This court stated that the issue was settled by *Baker v. Carr.* It is to be seen from the foregoing that Appellants question is without merit. Where the ratio in population of Senatorial districts is as high as 420 to 1, Appellant cannot be heard to say that the voters in the more populous senatorial districts have not been deprived of the equal protection of the laws.

Reply to Argument That a Constitutional Right to Vote May Be Waived.

Appellant argues that the right to vote is a personal one and therefore may be waived.

The issue of waiver is not relevant. The right to complain of impairment rests with every voter discriminated against. Even a voter who may have for lack of better judgment or knowledge voted to continue a method of representation that deprived other voters similarly situated would not be a bar to judicial relief under the Equal Protection Clause. Thus the Supreme Court in *Reynolds v. Sims* said: ". . . the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.

In *Lucas v. Colorado General Assembly,* 377 U.S. 713, 737 the Supreme Court similarly said, "A citizen's constitutional rights can hardly be impinged simply because a majority of the people choose that it be."

Reply to Appellants' Argument That Similar Provisions in the Constitution of Colorado Have Been Held to Preclude Validity of an Apportionment Statute Violating Them Notwithstanding That a Determination by a United States District Court That the Statute Was Offensive to the Equal Protection Clause.

Appellant attempts to draw an analogy from the case of *White v. Anderson.*

In *White v. Anderson,* 394 P. 2d 333, the Colorado Supreme Court held that a reapportionment statute dividing the counties to form senatorial districts was violative of the State Constitution.

The court further held that it was not foreclosed from passing on the validity of the Act by reason of a decree entered by a Three Judge Federal Court.

The Supreme Court concluded that until the citizens of the State amended the Constitution so as to permit such division neither the legislature nor the courts can do it for them.

The court however in upholding the constitutional provision which prohibited counties from being divided in the formation of senatorial districts nevertheless made a further order staying the effect of the judgment nullifying the reapportionment Act until the session of the Legislature to be held in 1965.

Article IV, Section 6 of the California Constitution provides that no county, or city and county shall be divided, nor shall a part of any county, or of any city and county be united with any other county or city and county in forming either an assembly or senatorial district. It also provides that *each senatorial district shall*

choose only one senator, and that no county shall contain more than one senatorial district.

The Colorado Act did *not* limit the counties to one senator, but made provision contrary to the State Constitution for a division of the counties into additional senatorial districts.

Thus in the *Colorado* case there was an opportunity to comply with the Equal Protection Clause without violating the State Constitutional provision forbidding the counties to be divided. This court as well as numerous State Supreme Courts have repeatedly now held that constitutional provisions limiting the number of legislators to no more than one to a county of other political subdivision must face the test of the Equal Protection Clause.

The Three Judge Court below held that the California method of representation under Article IV, Section 6 as amended in 1926 was invidiously discriminatory and invalid under the Fourteenth Amendment.

In rendering this decision the Three Judge Court followed the precedents established by this Court.

The reliance attempted by the Appellant on *White v. Anderson,* is just as futile as was the reliance asserted on *Scholle v. Hare,* 367 Mich. 176 116 N.W. 2d 350.

In *Marshal v. Hare,* 227 Fed. Supp. 989 (1964). the new constitution adopted by the voters was challenged under the Fourteenth Amendment on the ground it authorized a disparity of population of the senatorial districts. The Court below dismissed the suit. This Court reversed, 378 U.S. 561.

In *Germano v. Werner*, 220 F. Supp. 230 (1963). The lower court dismissed a complaint challenging the reapportionment of senatorial districts. The court upheld the constitutional provision which, in turn, had created certain senatorial districts based on a geographical basis.

This court reversed the judgment of dismissal, 378 U.S. 560. A similar reversal was made on the same grounds as to *Hearne v. Smylie*, 378 U.S. 563.

In *Davis v. Synhorst*, 225 F. Supp. 689 (Jan. 1964) the lower court held that the Constitutional Amendments dealing with apportionment were invalid. This court affirmed the judgment. 378 U.S. 565, June 22, 1964.

In *Petusky v. Clyde*, 234 F. Supp. 960 (Sept. 1964) a three judge court held that the provisions of the Utah Constitution requiring that each county have at least one member in the House of Representatives was in irreconcilable conflict with the Federal Constitution.

The provisions of the Utah Constitution are identical with the California Constitution, *i.e.*, no county shall be divided, and no part of a county was to be united with another county in the formation of a senatorial district.

The Utah Constitution also provided that each county shall be entitled to at least one representative. The court concluded that the Reapportionment Act of 1963 based on the Utah Constitution was "federally unconstitutional."

To the same effect is *Butterworth v. Dempsey*, 229 F. Supp. 754 (Feb. 1964), affirmed 378 U.S. 562 (June 1964).

The Motion to Take Judicial Notice of a Superior Court Case Filed by the Senate.

Despite the fact that the Senate intervened in this case, participated in the argument on the merits and are now before this court on appeal, the Senate as a diversionary and delaying tactic has filed a suit in the Superior Court of Sacramento County.

The senate disregarding the terms of the *per curiam* order of the three judge court seek to evade their duty to comply with the mandate of the court to reapportion prior to July 1, 1965.

The three judge court specifically decreed that jurisdiction was retained to permit any of the parties to make any motion for the holding of further hearings, or to devise redistricting plans.

The Appellants now ask this court to assist them in flaunting the *per curiam* order by granting their motion and petition.

The California Supreme Court has refused to accept jurisdiction in companion cases filed by other voters on three separate occasions. It is unlikely that the California Supreme Court would accept jurisdiction after the three judge Federal Court has rendered a decree on the merits.

It is further unlikely that the Superior Court will retain jurisdiction under these circumstances (*Pacific Electric Ry. v. Dewey*, 95 Cal. App. 2d 69.)

In *State v. Meier*, 127 N.W. 2d 665 (S. Ct. N. Dakota, April 1964) after a Federal Court had rendered a decree declaring a reapportionment law to be unconstitutional, the Plaintiffs filed a petition with the State Supreme Court. The Plaintiffs asked the State

Supreme Court to take original jurisdiction. The Plaintiffs further alleged they were following the directions of the Federal Court.

In denying the Petition the Supreme Court said, "We employ the doctrine of Comity—the Court that first acquires jurisdiction of the question retains it, which in this case is the United States District Court."

Conclusion.

The motion of the Appellee to dismiss the appeal or to affirm the judgment should be granted.

Respectfully submitted,

PHILL SILVER,

Appellee Pro Se.